

No. 75-1871

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

GENERAL FOODS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The principal question presented in this federal income tax case is whether income realized by petitioner from the redemption of certain non-interest bearing notes, which it had acquired at a discount, should be taxed as ordinary income or as short-term capital gain.

The pertinent facts are as follows: During its taxable year ending March 31, 1959, petitioner acquired short-term notes with no stated interest at less than face value and redeemed each note at maturity after holding it for not more than six months. Upon the redemption of the notes at face value, petitioner realized income attributable to original issue discount, which is the excess of the redemption price at maturity over the issue price. This income was generated solely by the passage of time and not by fluctuations in market value (Pet. App. 3a-4a).

On audit, the Commissioner of Internal Revenue determined that the original issue discount should be treated as ordinary interest income rather than short-term capital gain, so that petitioner could not offset such income against net capital losses. In this refund suit, the Court of Claims upheld the Commissioner's determination (Pet. App. 2a-5a, 12a).

The identical question is presented in *Boise Cascade Corporation v. United States*, No. 75-1853, petition for a writ of certiorari pending. For the reasons stated in our memorandum in opposition in *Boise Cascade*, a copy of which we are serving upon counsel for petitioner General Foods,¹ there is no basis for further review by this Court.

Petitioner also argues (Pet. 11-14) that the Commissioner's imposition of ordinary income tax rates on its original issue discount income was discriminatory because the Internal Revenue Service did not require similar treatment for non-resident alien individuals and foreign corporations. The Court of Claims properly rejected this claim. Apart from the fact that petitioner never raised it in its claim for refund (Pet. App. 12a), "the taxation of non-resident foreign taxpayers raises such different considerations that it cannot validly be compared, for equal protection purposes, to the taxation of domestic taxpayers" (Pet. App. 14a, Davis, J., concurring).

¹We are also serving a copy of our memorandum in this case upon counsel for Boise Cascade Corporation.

For the reasons stated above and in our memorandum in opposition in *Boise Cascade Corporation*, No. 75-1853, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.